

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
PETITION FOR
REHEARING**

CANONICAL

76-7261

**United States Court of Appeals
For the Second Circuit**

B
PLS

LILLIAN V. CANNON, individually and on behalf of all other
persons similarly situated,

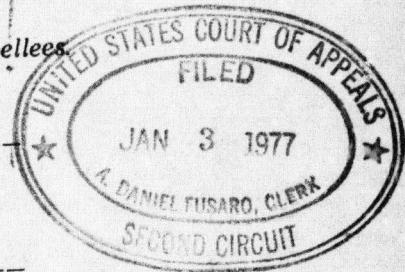
Plaintiffs-Appellants,

-against-

THE UNITED CHURCH BOARD FOR HOMELAND
MINISTRIES, and REV. OTIS YOUNG, REV. SERGE
HUMMON, REV. HOWARD SPRAGE, and MR. WILLIAM
NELSON, individually and as Officers of UNITED CHURCH
BOARD FOR HOMELAND MINISTRIES,

Defendants-Appellees.

APPELLANT'S PETITION FOR REHEARING



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Brooklyn, New York
(212) 834-8656

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK -----X

LILLIAN V. CANNON, individually and on
behalf of all other persons similarly
situated,

Plaintiffs,

-against-

76-7261

THE UNITED CHURCH BOARD FOR HOMELAND
MINISTRIES, and REV. OTIS YOUNG, REV.
SERGE HUMION, REV. HOWARD SPRAGE, and
MR. WILLIAM NELSON, individually and as
Officers of UNITED CHURCH BOARD FOR
HOMELAND MINISTRIES,

----- Defendants, -----X

INTRODUCTORY STATEMENT

This is a petition for rehearing, by the three judge panel,
or in the alternative, by the full court sitting en banc. Said petition
is filed pursuant to Rule 40 of the Federal Rules of Appellate Procedure.

I have discussed this appeal with Ralph Munoz, general coun-
sel in the New York District Office of the Equal Employment Opportunity
Commission; and with Raj Gupta, an attorney in the Appellate Division
of the central (Washington, D.C.) office of the Equal Employment Opport-
unity Commission. Mr. Gupta informs me that there is an excellent
chance that the EEOC will seek the court's permission to file an amicus
brief in support of the petition for rehearing.

Accordingly, I respectfully request that this court withhold
action on this petition for two weeks, to give the EEOC the opportunity

to petition for permission to appear amicus, (if it should choose to do so).

POINT I: IN THE INTERESTS OF JUSTICE, THIS COURT SHOULD RECONSIDER ITS DECISION OF DECEMBER 17, 1976; AND SHOULD FIND THAT PLAINTIFF'S COMMENCEMENT OF THIS ACTION, ON OCTOBER 10, 1976, WAS TIMELY WITHIN THE REQUISITE 90 DAY TIME PERIOD.

The circumstances surrounding the compliance with, or failure to comply with, the 90 day time limit, are set forth in detail under Point II of appellant's main brief. A brief summary follows:

Plaintiff received a letter from the EEOC dated June 23, 1975, informing her that her complaint was being dismissed, and advising her that if she wished to sue, she must send a letter to the EEOC by return mail, requesting a Notice of Right to Sue. Said letter made no mention of any 90 day time limit.

Subsequently, plaintiff received a second letter, a Notice of Right to Sue letter dated July 15, 1975, informing her that she had 90 days from the date of receipt of said notice, to file suit in federal court.

Plaintiff first visited the office of present counsel, and first retained counsel, on September 24, 1975. An action was commenced in the Southern District of New York, on October 10, 1975.

In view of this court's decision in DeMatteis v Eastman Kodak Co., 511 F. 2d 306, modified on rehearing, 520 F. 2d 409; the EEOC's

procedures were clearly erroneous, and served to misinform plaintiff.

In the second DeMatteis opinion, this court recognized the injustice of having DeMatteis be deprived of his day in court because of the misinformation he received from the EEOC. The court stated that the issue had been one of first impression, and added, at 520 F 2d 411:

"It would be inequitable under such circumstances, and would frustrate the remedial purpose of the Civil Rights Act, to apply the decision of this court so as to bar the claim of a party who filed suit within the period recommended by the administrative body which has been established to help vindicate such statutory rights."

The court then announced that the new rule would take effect on May 7, 1975; and that any actions which were commenced subsequent to May 7, 1975 would be required to conform to the new rule as enunciated in DeMatteis.

Implicit in this court's DeMatteis rule was the assumption that the EEOC, as a government agency interested in protecting the rights of potential plaintiffs in anti-discrimination cases, would change its procedures, and include a 90 day notice in its first notice of final determination or notice of dismissal; thereby avoiding the DeMatteis problem in the future.

In fact, I have been informed by the EEOC attorneys that the EEOC has changed its practice, and now makes it a general practice to include a 90 day notice with the first notice of dismissal. Hopefully,

the EEOC will clarify its present procedures, and the date or dates of their implementation, if it appears amicus in this case.

Unfortunately, the bureaucratic implementation of new practices and procedures moves slowly; in this case the change in procedures was not adopted quickly enough to help plaintiff. Plaintiff received her first letter on June 23, 1975, only a month after the cut off date set forth in the second DeMatteis case.

This court's position appears to be that, having announced the law, and having announced a May 7, 1975 cut off date in DeMatteis, all future litigants are charged with knowledge of this rule.

However, the ancient adage "ignorance of the law is no excuse" should not be applicable here, and to apply it would result in a manifest injustice. Where the government says nothing, then a prospective litigant can be charged with knowledge of the law. If the government had stated no time limit, it could be argued that plaintiff should have consulted an attorney, who would have informed her of her time limit to commence suit.

However, when the government (the EEOC) informed plaintiff, on July 15, 1975, that she had 90 days from that date in which to commence an action, the matter was on an entirely different footing. Now there was no need for plaintiff to consult counsel regarding the time limit to sue; instead, she reasonably relied upon the information she

received from the government agency with expertise in the area. Accordingly, she first consulted an attorney on September 24, 1975, which she reasonably assumed was three weeks before the statute of limitations would run.

If this court is concerned that to grant an additional exception to the DeMatteis rule, would open the floodgates, such concern is unnecessary. In view of the EEOC's change in procedures, shortly after the DeMatteis opinion, it is highly likely there are very few, if any, other similarly situated plaintiffs whose right to sue might be affected.

In fact, counsel is not aware of any pending cases involving the present fact situation, i.e., where a plaintiff commenced suit more than 90 days after an initial EEOC determination, but less than 90 days after receipt of a second EEOC letter, a notice of Right to Sue.

Opposing counsel's suggestion (on page 18 of appellees' brief) that a contrary ruling would permit a potential plaintiff to delay indefinitely and to request and obtain a right to sue letter at a much later date, is without merit. In the instant case, we are dealing with a three week delay, not an indefinite delay. Furthermore, the three week delay was caused by the EEOC's suggestion that a Notice of Right to Sue was necessary; not by any desire for delay on the part of the plaintiff.

In view of the above, it is respectfully requested that this

court reconsider its ruling of December 17, 1976, and hold that plaintiff's commencement of action was timely within the 90 day time limit.

POINT II: THE SUPREME COURT'S RECENT DECISION IN GUY V ROBBINS & MYERS, HOLDING THAT RESORT TO ARBITRATION DOES NOT TOLL THE TIME PERIOD FOR FILING WITH THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, IS NOT APPLICABLE TO THE INSTANT CASE.

On December 20, 1976, the Supreme Court decided the case of Guy v Robbins & Myers, Inc., / The court held that the 180 day (or 300 day) time limit for filing a complaint with the EEOC is not tolled by resort to labor-management grievance procedures, including arbitration.

The court reasoned that the statute of limitations should not be tolled, because labor management grievance proceedings, and Title VII proceedings before the EEOC, are two independent remedies, which can be pursued simultaneously. (To this effect, the court cited Alexander v Gardner-Denver, 415 U.S. 36).

By contrast, the court distinguished Burnett v New York Central Railroad, 380 U.S. 424. In Burnett, the Supreme Court held that filing a claim in state court would toll the running of the statute of limitations on the same cause of action in federal court.

As the Supreme Court stated, in Guy v Robbins & Myers, at 45 U.S.L.W. 4068.

Here petitioner Guy in the grievance proceedings was not asserting the same statutory claim in a different forum, nor giving notice to respondent of that statutory claim, but was asserting an independent claim based upon a contract right.

(Alexander v Gardner-Denver, supra, at 53-54, 56-58.)
Burnett can not aid this petitioner."

Thus, the statute of limitations on a Title VII claim will not be tolled for a labor arbitration, since the two claims are distinct and independent. The labor arbitration may involve separate issues under the collective bargaining agreement which have nothing to do with discrimination. In a labor arbitration, the employer must usually prove that the employee was discharged for cause; whereas in a Title VII proceeding the employee must prove discrimination.

By contrast, in the instant case, plaintiff is asserting the same statutory claim in a different forum. Plaintiff's cause of action under Title VII would be substantially identical, in substance, with her cause of action under the New York City and State antidiscrimination statutes; both claims would involve substantially identical issues of fact and law.

Furthermore, plaintiff could not pursue a state antidiscrimination claim, and an EEOC, claim, simultaneously. 42 U.S.C. 2000e-5 (subd d), and 29 C.F.R. 1601.12, require that the EEOC defer to state and local agencies.

Therefore, the instant case is far more closely analogous to Burnett, than to Guy.

CONCLUSION:

In view of the above, the motion for rehearing should
be granted.

Respectfully submitted

EUGENE PROSNITZ
Attorney for Plaintiff-
Appellant

7/1 01/03
~~264~~
United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit,
held at the United States Court House, in the City of New York, on the 17th
day of December , one thousand nine hundred and seventy-six.

Present:

HON. LEONARD P. MOORE,

HON. ROBERT P. ANDERSON,

HON. WILFRED FEINBERG,

Circuit Judges.

LILLIAN V. CANNON, individually and on
behalf of all other persons similarly
situated,

Plaintiffs-Appellants,

- against -

THE UNITED CHURCH BOARD FOR HOMELAND
MINISTRIES, and REV. OTIS YOUNG, REV.
SERGE HUMMON, REV. HOWARD SPRAGE, and
MR. WILLIAM NELSON, individually and as
Officers of UNITED CHURCH BOARD FOR
HOMELAND MINISTRIES,

Defendants-Appellees

76-7261

Upon further consideration, it is hereby ordered that the last
paragraph of the prior order of this Court dated December 1, 1976 in
the above entitled case be amended to read as follows:

ON CONSIDERATION WHEREOF, it is now hereby
ordered, adjudged, and decreed that the judgment of
said District Court be and it hereby is affirmed on
the alternative holding of Judge Gagliardi, in his
opinion dated April 27, 1976, that plaintiff's com-
plaint was not filed in the district court within
the requisite 90-day period. DeMatteis v. Eastman
Kodak Co., 511 F.2d 306; 520 F.2d 409.

Leonard P. Moore
LEONARD P. MOORE

Robert P. Anderson
ROBERT P. ANDERSON

Wilfred Feinberg
WILFRED FEINBERG

Circuit Judges



EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT OFFICE
90 CHURCH STREET, ROOM 1301
NEW YORK, NEW YORK 10007

June 23, 1975

Ms. Lillian Cannon
77-79 Columbia Street
New York, New York

Re: Cannon v. United Church/
Board for Homeland Minis-
tries
TNY 3-0796

Dear Ms. Cannon:

This is in further reference to the complaint of employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, filed by you.

This office has concluded that the Commission has no jurisdiction and your complaint has been dismissed for the following reason:

The unlawful practice alleged in your complaint of discrimination occurred in a State which has an agency to which this Commission defers prior to taking action on a charge. Title VII requires that such a complaint of discrimination be filed within 300 days of the alleged discriminatory act. Your complaint was not filed within that period.

If you object to this office's dismissal of your charge, you may contest your objection in the U.S. District Court. If you wish to follow this course, please use the enclosed envelope to send us a letter requesting a "Notice of Right-to-Sue" in your case, and explaining why you believe we have jurisdiction over your complaint.

Sincerely,

Arthur W. Stern
Arthur W. Stern
District Director

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

JUL 15 1975

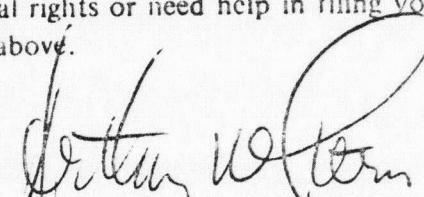
TO:	FROM:		
Ms. Lillian V. Cannon 77-79 Columbia Street New York, New York 10002	Equal Employment Opportunity Comm. New York District Office 90 Church Street, Room 1301 New York, New York 10007		
THIS CHARGE HAS BEEN DISMISSED FOR THE FOLLOWING REASON:		EEOC REPRESENTATIVE	
<input type="checkbox"/> NO REASONABLE CAUSE <input checked="" type="checkbox"/> UNTIMELY CHARGE <input checked="" type="checkbox"/> NO JURISDICTION <input type="checkbox"/> FAILURE TO PROCEED		Ralph Munoz, District Counsel	
		TELEPHONE NUMBER	CASE/CHARGE NUMBER
		264-7161 7165	TNY 3-0790

If you want to pursue your charge further, you have the right to sue the respondent(s) named in this case in the United States District Court for the area where you live. If you decide to sue, you must do so within ninety (90) days from the receipt of this Notice; otherwise your right is lost.

If you do not have a lawyer or are unable to obtain the services of a lawyer, take this Notice to the United States District Court which may, in its discretion, appoint a lawyer to represent you.

An information copy of this Notice has been sent to the respondent(s) named in this case.

If you have any questions about your legal rights or need help in filing your case in court, call the EEOC representative named above.



District Director

CC:
 President
 United Church Board for Homeland Ministries
 287 Park Avenue South
 New York, New York 10002

LAW OFFICES
EUGENE F. PROSNITZ
50 COURT STREET
BROOKLYN, N. Y. 11201
212 834-8656

I hereby retain Eugene Prosnitz, Esq., to represent me in my lawsuit
in federal court, against the United Church-*Board for Homeland Ministries* -

I agree to pay a legal fee, as follows:

A minimum fee of one thousand (\$1000.00), payable as follows:

\$300.00 on or before Oct. 1, 1975.

\$100.00 per month, commencing on Nov. 1, 1975, until said fee is paid.

In addition, if we are successful in this lawsuit, and I ~~am~~ ~~get~~ back
pay, I agree to pay, as a legal fee, one third of all monies recovered. I
understand that the \$1000.00 fee I am paying will count as part of the one third
fee.

If any legal fees are received from the defendant, in this lawsuit, said
fees will be deducted from the fee I ~~owe~~ *pay.*

Lillian Cannon
LILLIAN CANNON

Sept 24, 1975

PROSNITZ

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 3 day of Jan. 1976 deponent served the within Petition upon
7
Maning, Carey & Redmond, Esqs.

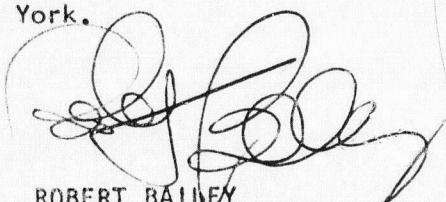
attorney(s) for

defendants-Appellees

in this action, at

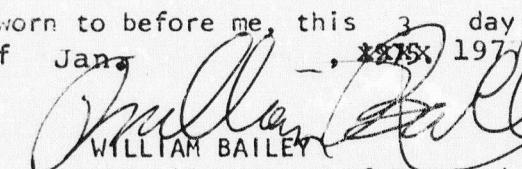
122 ~~xxxx~~ East 42nd St., NYC ~~xxxx~~ 10017

the address(es) designated by said attorney(s) for that purpose by depositing 3 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.



ROBERT BAILEY

Sworn to before me, this 3 day
of Jan. 7, 1976.



WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978